IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1563

THE BOEING COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD

and

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, IN OPPOSITION

The question which Petitioner seeks to present is whether a union violates section 8(b)(1)(A) of the National Labor Relations Act by levying a court-collectible fine for strikebreaking against members "whether or not . . . [they] had resigned their union

membership and . . . whether or not the fines related to the period *before* . . . resignation" (Pet. pp. 2-3, emphasis supplied). It is Petitioner's thesis that even during his period of membership a member may engage in strikebreaking free of the imposition of a court-collectible fine for that action.

The question thus presented has been decided adversely to Petitioner by this Court in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), the Court holding that a member is subject to union discipline exerted by the levy of a court-collectible fine for strikebreaking. Accordingly, as Petitioner candidly states (Pet. 8-10), it seeks reconsideration and reversal of *Allis-Chalmers*. However, as the National Labor Relations Board notes in its memorandum, there is "nothing that warrants re-examination of *Allis-Chalmers*" (p. 3). Stability and predictability require that this Court's decision of a question of statutory interpretation, correctible by Congress if the decision is thought erroneous, should not be recanvassed and undone absent compelling need. None appears here.

Furthermore, there is an insuperable jurisdictional bar to consideration of the question that Petitioner presents. The question is not within the scope of the complaint which the NLRB General Counsel issued and prosecuted. His complaint is limited to two claims: (1) a court-collectible fine may not be levied for strikebreaking engaged in *subsequent* to resignation, and (2) a court-collectible fine for *preresignation* strikebreaking must be reasonable in amount. The question that Petitioner seeks to present is beyond the purview of either claim. It is therefore not entertainable because it is outside the issues tendered by

the NLRB General Counsel who has exclusive statutory authority to shape the complaint.

Section 8(d) of the National Labor Relations Act provides that the NLRB General Counsel "shall have final authority . . . in respect of the . . . issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board. . . ." Accordingly, "the decision whether to issue a complaint, the contents of the complaint, and the management of the prosecution before the Board is entrusted to the sole discretion of the General Counsel. . . ." *Sailors' Union of the Pacific*, 92 NLRB 547, n. 1 (1950). As the "General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint" (*Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967)), neither the Board initially, nor a court on ensuing judicial review, is empowered to decide an issue which the complaint does not tender. The question that Petitioner seeks to present, being outside the scope of the claims put in issue by the General Counsel in his complaint, is thus not open to adjudication.[1]

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[1] *N.L.R.B.* v. *Raytheon Co.*, 445 F.2d 272, 274 (C.A. 9, 1971); *National Maritime Union* v. *N.L.R.B.*, 423 F.2d 625, 626 (C.A. 2, 1970); *Steelworkers* v. *N.L.R.B.*, 393 F.2d 661, 664 (C.A.D.C., 1968); *Wellington Mills Division, West Point Mfg. Co.* v. *N.L.R.B.*, 330 F.2d 579, 590-591 (C.A. 4, 1964), cert. denied, 379 U.S. 892 (1964); *International Union of Electrical Workers* v. *N.L.R.B.*, 280 F.2d 737, 761-762 (C.A.D.C. 1960); *Pisarchi Aircraft Corp.* v. *N.L.R.B.*, 280 F.2d 575, 588 (C.A. 3, 1960), cert. denied, 364 U.S. 933 (1961); *N.L.R.B.* v. *Bar-Brook Mfg. Co.*, 220 F.2d 832, 834 (C.A. 5, 1955).

The petition should therefore be denied.

Respectfully submitted,

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